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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

In re R.T., a Person Coming Under the Juvenile Court Law.	B292346 (Los Angeles County Super. Ct. No. DK09577C)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. JESSICA D. et al., Defendants and Appellants.	

APPEALS from an order of the Superior Court of Los Angeles County, Kim L. Nguyen, Judge. Affirmed.

David A. Hamilton, under appointment by the Court of Appeal, for Defendant and Appellant Jessica D.

Jack A. Love, under appointment by the Court of Appeal, for Defendant and Appellant Russell T.

Mary C. Wickham, County Counsel, Kristine P. Miles, Assistant County Counsel, and Stephanie Jo Reagan, Principal Deputy County Counsel, for Plaintiff and Respondent.

Jessica D., mother of three-year-old R.T., petitioned pursuant to Welfare and Institutions Code section 388[1] for reinstatement of family reunification services. On August 28, 2018 the juvenile court summarily denied the petition and, pursuant to section 366.26, terminated Jessica's parental rights. On appeal Jessica contends the court erred in denying her petition without an evidentiary hearing. R.T.'s presumed father, Russell T., joins in Jessica's arguments to the extent they benefit him. (Cal. Rules of Court, rule 8.200(a)(5).) We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In January 2016 the court sustained an amended section 300 petition finding R.T. was at substantial risk of serious physical harm because Jessica and Russell had a history of engaging in domestic violence in the presence of R.T., then an infant; Russell abused marijuana while caring for R.T. and left him unsupervised at the family home; Jessica had a long and unresolved history of illicit drug use, including methamphetamine and opiates; and Jessica's older daughter, R.T.'s half-sibling, had been declared a dependent of the court in a prior dependency action due to Jessica's illicit drug use. The court declared R.T. a dependent child of the court, removed him from parental custody and ordered family reunification services for both parents, including monitored visitation, random and on-

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[1] Statutory references are to this code.

demand drug testing, counseling and completion of a substance abuse program.

Shortly after the jurisdiction hearing, Jessica tested positive for codeine and morphine; she then abruptly stopped drug testing and left her domestic violence shelter without notice or explanation. After three visits with R.T. in March 2016, Jessica stopped visiting R.T. Despite the court's order, she did not enroll in a drug treatment program. In July 2016 Jessica telephoned the social worker to apologize for her disappearance, explaining she had felt overwhelmed and hoped to start over with R.T. and to find a new shelter, so she could get back on track and resume her case plan. Following this conversation, Jessica failed to contact or respond to the Department's inquiries for nearly two years.

At the September 12, 2016 contested sixth-month review hearing (§ 366.21, subd. (e)), the court adopted the Department's recommendation and terminated Jessica's reunification services. The court found Jessica had not consistently and regularly contacted and visited with R.T., had not made significant progress in resolving the problems that had led to R.T.'s removal and had not demonstrated the capacity and ability to complete the objectives of her treatment plan and provide for R.T.'s safety and well-being. The court continued Russell's family reunification services.

At the contested 12-month review hearing (§ 366.21, subd. (f)), the court terminated Russell's family reunification services and set a selection and implementation hearing (§ 366.26) for July 11, 2017. The court continued that hearing multiple times primarily because of difficulty locating Jessica.

The court eventually set the section 366.26 hearing for August 28, 2018.

In May 2018 Jessica reappeared and enrolled in a 12-week residential drug treatment program. On June 15, 2018 the court ordered the Department to provide Jessica with one 15-minute monitored visit per week with R.T. Jessica visited regularly with R.T. while she was in her residential program, and the social worker reported no incidents of concern.

On August 28, 2018, the date of the selection and implementation hearing, Jessica petitioned pursuant to section 388 to modify the court's September 12, 2016 order terminating her family reunification services. Jessica reported she had completed her 12-week drug treatment program on August 1, 2018, including individual counseling, parenting and domestic violence classes. She was currently enrolled in a housing assistance program. Since beginning her program in May 2018, she had tested negative for all substances. While acknowledging her long absence from R.T.'s young life, Jessica stated her recent participation in the prescribed programs had finally enabled her to address and resolve the issues that had resulted in R.T.'s removal from her care. Jessica stated she believed it was in R.T.'s best interests to be reunited with his genetic mother. Jessica submitted with her petition documentation that, among other things, confirmed her active participation in, and recent completion of, her residential drug treatment program, including a letter from her counselor stating that Jessica had "a great potential for success in recovery if she continues to stay the course that she has planned for herself as she exited treatment."

The court summarily denied Jessica's section 388 petition, finding Jessica had not stated a prima facie case for holding a hearing. The court explained, "First, I think, at most, the evidence shows chang[ing] circumstances as opposed to [a] change of circumstances. I'll note that the case plan was ordered as early back as 2016. Mother had almost no contact with the child over quite a long period of time. In fact, that mother has completed what appears to be a 12-week drug treatment program, has tested just four times, with a parenting course as well," is not a sufficient prima facie showing of a change of circumstances. The court continued, "Furthermore, the court does not find a prima facie showing has been met for a contested hearing on the issue of best interest of the child. Mother indicates she's the biological mother of the child. However, I'll note that [R.T.] has been with his current caretakers for a good portion of his life now. And given the need for stability at this young age, the court does not find that the best interest component has been met with a prima facie showing."

Over Jessica's and Russell's objections, the court terminated their parental rights, freeing R.T. for adoption.

DISCUSSION

1. *Governing Law and Standard of Review*

Section 388 provides for modification of juvenile court orders when the moving party presents new evidence or a change of circumstances and demonstrates modification of the previous order is in the child's best interests. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 317; *In re Jasmon O.* (1994) 8 Cal.4th 398, 415; see Cal. Rules of Court, rule 5.570(e).) To obtain a hearing on a section 388 petition, the parent must make a prima facie showing as to both elements. (*In re K.L.* (2016) 248 Cal.App.4th 52, 61;

In re G.B. (2014) 227 Cal.App.4th 1147, 1157.) The petition should be liberally construed in favor of granting a hearing, but "[t]he prima facie requirement is not met unless the facts alleged, if supported by evidence given credit at the hearing, would sustain a favorable decision on the petition." (*In re Zachary G.* (1999) 77 Cal.App.4th 799, 806; accord, *In re K.L.,* at p. 61.) When determining whether the petition makes the necessary showing, the court may consider the entire factual and procedural history of the case. (*In re K.L.,* at p. 62; *In re Jackson W.* (2010) 184 Cal.App.4th 247, 258.)

We review the summary denial of a section 388 petition for abuse of discretion. (*In re K.L., supra,* 248 Cal.App.4th at p. 61; *In re A.S.* (2009) 180 Cal.App.4th 351, 358.) We may disturb the juvenile court's exercise of discretion only in the rare case when the court has made an arbitrary or irrational determination. (*In re Stephanie M.*, *supra*, 7 Cal.4th at p. 318.)

2. *The Juvenile Court Did Not Abuse Its Discretion in Summarily Denying Jessica's Section 388 Petition*

Jessica contends her section 388 petition sufficiently stated a prima facie case for modification of the court's order terminating her reunification services. Jessica asserts that, in stark contrast to the drug-addicted woman who demonstrated a lack of commitment to her case plan and to R.T. at the time the court terminated her reunification services, she provided evidence she had successfully completed a 12-week comprehensive drug treatment program, as well as parenting and domestic violence classes, and had enrolled in a housing assistance program. The court credited Jessica's progress. However, observing that Jessica had completed the treatment program a mere three weeks before the selection and implementation hearing, more than two years after R.T. had been

removed from her custody as an infant, the court found Jessica's averred change of circumstances was simply too recent to state a prima facie case for modification of the prior order.

Jessica argues this finding, at least when made as a threshold bar to an evidentiary hearing, is contrary to the express language of section 388, which by its terms requires only a "change of circumstances," not that the change be long-standing. (See § 388, subd. (a)(1) [parent or other person with an interest in a dependent child may petition "upon grounds of change of circumstance or new evidence" to modify prior court order].) Those courts that have created a distinction between a "change of circumstances" and "changing circumstances" and found the latter insufficient, she contends, have misconstrued section 388 to the detriment of parents like Jessica who are actively in recovery. (See *In re Mickel O.* (2011) 197 Cal.App.4th 586, 615 ["the petitioner must show *changed,* not changing, circumstances"]; *In re A.S.*, *supra*, 180 Cal.App.4th at p. 358 ["[t]his showing of changing circumstances is not sufficient to require a hearing on the merits of Joseph's section 388 petition"]; see also *In re Ernesto* (2014) 230 Cal.App.4th 219, 223 [to support a section 388 petition the purported change of circumstances must be substantial; "[a]ppellant's completion of a drug program, at this late a date, though commendable, is not a substantial change of circumstances"]; *In re Cliffton B.* (2000) 81 Cal.App.4th 415, 423-424 [120 days of sobriety not enough to show significant change of circumstances]; *In re Kimberly F.* (1997) 56 Cal.App.4th 519, 531, fn. 9 ["[i]t is the nature of addiction that one must be 'clean' for a much longer period than 120 days to show real reform"].) Requiring the moving party's changed lifestyle be maintained for an extended period, Jessica argues, is not only

contrary to the express terms of section 388, but also would deny a parent the benefit of section 388's "escape mechanism" designed to assist parents like her who are able to reform in the period between termination of reunification services and termination of parental rights. (See *In re Marilyn H.* (1993) 5 Cal.4th 295, 309 [section 388 provides the "escape mechanism" that allows the court to consider new information and address a legitimate change of circumstances while protecting the child's need for prompt resolution of his or her custody status].)

Even if Jessica's very recent recovery were sufficient for a prima facie showing of a change of circumstances, the first prong of the section 388 analysis, the nature and extent of a parent's purported recovery from addiction and whether it is adequate to address the child's overriding interest in permanency and stability are precisely the appropriate focus of the second prong of that analysis, the child's best interests. (See *In re J.C.* (2014) 226 Cal.App.4th 503, 527 [a parent's petition to reopen reunification efforts "must establish how such a change [of circumstances] will advance the child's need for permanency and stability"]; *In re Casey D.* (1999) 70 Cal.App.4th 38, 48 ["[a] petition [that] alleges merely changing circumstances and would mean delaying the selection of a permanent home for a child to see if a parent, who has repeatedly failed to reunify with the child, might be able to reunify at some future point, does not promote stability for the child or the child's best interests"].) In this regard, Jessica's petition indisputably comes up short.

To be sure, if a petition presents "any evidence that a hearing would promote the best interests of the child," the court must order a hearing. (*In re Jasmon O., supra,* 8 Cal.4th at p. 415; see § 388, subd. (d).) Here, however, Jessica's best-

interests contention, even liberally construed, is based solely on her and R.T.'s shared genetics. If that factor alone were sufficient to satisfy the best-interests prong, no parent seeking modification of a court order under section 388 would need to show the proposed modification actually benefited the dependent child. Of course, there is no such parental exemption from that statutory mandate. (See *In re J.C., supra,* 226 Cal.App.4th at p. 527 ["In essence, Mother is asserting it is in J.C.'s best interests to preserve the biological parent-child relationship"; however, Mother's genetic relationship with J.C. alone is insufficient to demonstrate that modification of the court's order would promote the child's interest in permanency and stability]; see generally *In re Marilyn H., supra,* 5 Cal.4th at pp. 309-310 [following termination of reunification services and the setting of a section 366.26 hearing, the parent's interest in reunification must yield to the child's best interests in permanency and stability; "[c]hildhood does not wait for the parent to become adequate"].)

Jessica did not aver in her section 388 petition, let alone provide any evidence, that reinstating family reunification services, with its attendant delay in providing R.T. with permanency and stability, would be in R.T.'s best interests. Nor does the record reflect any evidence to support such a finding.

The July 2018 progress report attached to Jessica's petition established that R.T. was thriving in the care of his prospective adoptive parents with whom he had lived most of his life and shared a deep bond. Although Jessica had by the time of her petition completed the programs ordered several years earlier, her sobriety was very recent. While she intended to remain sober, Jessica had an inconsistent history in following through

with her stated intentions, as she demonstrated during the three years of the dependency proceedings. In light of the petition and supporting documentation, the court's finding that Jessica had not stated a prima facie case that delaying R.T.'s adoption and awarding Jessica additional family reunification services would be in R.T.'s best interests was an appropriate exercise of the court's discretion. The court did not err in summarily denying Jessica's section 388 petition. (See *In re K.L., supra,* 248 Cal.App.4th at pp. 62-63 [court did not abuse its discretion in denying mother's section 388 petition without a hearing; "[i]n light of the history of the dependency proceeding, the court did not err in concluding that [mother's] broad assertions did not constitute a prima facie showing that the proposed placement changes would be in the best interests of the children"]; *In re G.B., supra,* 227 Cal.App.4th at p. 1160 [court did not err in summarily denying section 388 petition]; see also *In re J.C., supra,* 226 Cal.App.4th at p. 527.)

Russell's appeal advances no additional basis for reversal of the court's order terminating his parental rights. Because we affirm the order denying Jessica's section 388 petition without a hearing, his appeal, dependent on our reversal of that order, also fails.

DISPOSITION

The juvenile court's August 28, 2018 order summarily denying Jessica's section 388 petition and terminating Jessica's and Russell's parental rights over R.T. is affirmed.

PERLUSS, P. J.

We concur:

SEGAL, J. FEUER, J.